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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant:	EWALD	:	Group Art Unit:	3625
Serial No.	10/672,133	:	Examiner:	Smith, J.
Filed:	09/26/2003	:	Confirmation No.	6111
For:	SYSTEM AND METHOD FOR PURCHASING LINKED WITH BROADCAST MEDIA	:	Attorney Docket No.	49663.21740

APPLICANT'S REPLY BRIEF PURSUANT TO 37 C.F.R. §41.41

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant submits this Reply Brief in response to the Answer of Examiner, and specifically to the arguments regarding enablement of the cited *Kesling* reference (US 2002/0132575 A1). Specifically, the Answer states (1) that *Kesling* is entitled to a presumption of enablement; and (2) Applicant has not pointed to any facts to show *Kesling* is not so enabled. Applicant traverses these assertions as incorrect.

1. Kesling is Not Entitled to a Presumption of Enablement as It Does Not Expressly Anticipate or Make Obvious the Element of a "Purchase Request"

The Answer correctly cites MPEP §2121: "When the reference relied on expressly anticipates or makes obvious all of the elements of the claimed invention, the reference is presumed to be operable. Once such a reference is found, the burden is on applicant to provide facts rebutting the presumption of operability. *In re Sasse*, 629 F.2d 675, 207 USPQ 107 (CCPA 1980)." (emphasis added) However, even by the Answer's own description, *Kesling* does not expressly teach the element of the "purchase request," and therefore is not "presumed to be operable" for such function.

The term "purchase request" is nowhere stated or defined in *Kesling*, and as discussed in Applicant's Appeal Brief, *Kesling* does not otherwise expressly disclose

this element. The Examiner relies upon a single passage to suggest there is a "purchase request" (Answer, p. 8) and then argues the semantics of the terms based upon "grammatical proximity." (Answer, p. 10) By its own argument, the Answer shows that concept of the "transaction" of *Kesling* is not expressly equal to Applicant's claimed "purchase request" and such interpretation is latent with ambiguity. See, e.g., Answer at p. 10: "It is admitted that grammatical proximity can bear heavily upon an interpretation by a reader (in this case, the skilled artisan) of an author's sentiment. However, proximity should weigh only as one factor of many factors in making such determination." Without the element of the "purchase request" being expressly shown, *Kesling* is not entitled to a presumption of operability and enablement relative to that element.

2. Applicant has Pointed to the Fact that One Speculative Sentence in *Kesling* Is Insufficient to Enable a Full Interactive Purchase Request

The Answer summarily states that Applicant has pointed to no facts that would rebut the improper presumption of operability. (Answer, p. 12) Applicant has pointed to the only fact in evidence regarding enablement—one speculative sentence. (Appeal Brief, pp. 6-7) Applicant has also discussed the lack of any description of technology in *Kesling* that would otherwise be enabling of a full "purchase request" which the Answer does not address. Applicant has clearly shown through the relevant facts in evidence—namely the disclosure of *Kesling*—that should the "transaction" of *Kesling* be contorted to encompass a full "purchase request," then there simply is no technical disclosure given in *Kesling* to support such a function.

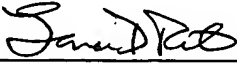
Conclusion

The arguments in the Answer show the intent of MPEP §2121, that only "expressly" anticipated elements are entitled to a presumption of enablement. Otherwise, what occurs is what the Examiner has done here--broaden an element in a cited reference to encompass an unsupported function and then simply rely upon a presumption of enablement when the operability of such broadened function is questioned. Applicant has shown that the "transaction" does not encompass a "purchase request," there is no presumption of operability for this non-express

interpretation, and ultimately, there is insufficient disclosure to enable this function in *Kesling*. The Examiner should therefore be reversed and the application allowed.

Respectfully submitted,

Stephen A. Ewald
By his Representatives,



Lance D. Reich
Reg. No. 42,097

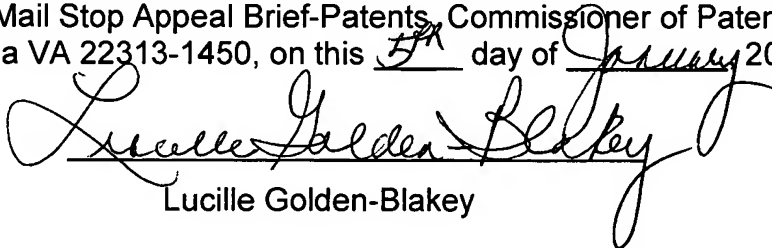
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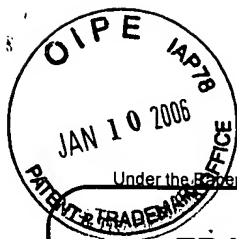
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Total Number of Pages in This Submission 3

Application Number	10/672,133
Filing Date	09/26/06
First Named Inventor	Ewald
Art Unit	3625
Examiner Name	J. Smith
Attorney Docket Number	49663.21740

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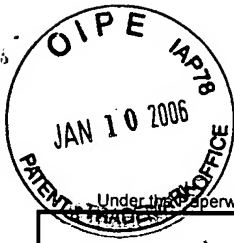
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